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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER AND MICHAEL AVERY
Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises out of respondent trial judge's certification of a 48-state, five-million-person class action. Although only a small fraction of the class resides in Illinois, the trial court concluded that the case could be tried as a class action because the jury could apply the consumer fraud law of Illinois, petitioner's home state, to all class members' claims. Further, in an effort to make this massive class action manageable, the court relieved class counsel of the burden of proving the class members' highly fact-specific claims on an individualized basis. Finally, the court refused to require that class counsel provide actual notice to the 1.8 million members of the class who can be identified with specificity, ruling instead that publication notice is permissible for the entire class. The questions presented are:

1. Whether a court may constitutionally apply the law of the defendant's domicile to claims arising out of transactions that occurred entirely in other States, many of which have statutes or regulations specifically governing those transactions.

2. Whether it is consistent with due process requirements for a state court, in order to make class action treatment manageable, to relieve the class of its burden of proving the fact-specific claims of individual class members and to deprive the defendant of the opportunity to put on individualized proof to refute those claims.

3. Whether, in a class action seeking predominantly monetary relief, a state court's refusal to require that actual notice be provided to those members of the class whose names and addresses can be identified from petitioner's records violates the Due Process Clause of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

State Farm Mutual Automobile Insurance Company ("State Farm")[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois refusing to issue a writ of mandamus and/or prohibition or, in the alternative, a supervisory order in this case.

OPINIONS BELOW

The order of the Illinois Supreme Court denying State Farm's mandamus/prohibition/supervision petition (App., *infra,* 1a) is unreported. The trial court's orders certifying the class (*id.* at 2a-17a), amending the class certification (*id.* at 18a-20a), and approving class counsel's notice plan (*id.* at 21a-32a) are unreported.

JURISDICTION

The Illinois Supreme Court denied State Farm's mandamus/prohibition/supervision petition on March 24, 1998. App., *infra,* 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257. Because in Illinois petitions for mandamus, prohibition, and supervisory orders are regarded as original actions (see Ill. S. Ct. R. 381, 383), the Illinois Supreme Court's denial of State Farm's petition is a final judgment for purposes of this Court's jurisdiction under Section 1257. *Fisher v. District Court,* 424 U.S. 382, 385 n.7 (1976); *Madruga v. Superior Court,* 346 U.S. 556, 557 n.1 (1954); *Pacific Coast Dairy v. Department of Agric.,* 318 U.S. 285 (1943); *Board of Educ. v. Superior Court,* 448 U.S. 1343, 1345-1346 (1980) (Rehnquist, J., in chambers); Robert L. Stern, et al., Supreme Court Practice 108 (7th ed. 1993).

STATEMENT

Multi-state class actions in state court have become the equivalent of legalized extortion. Class action lawyers identify one or two "representative" plaintiffs and carefully select a plaintiff-friendly forum — generally one with no connection to the claims of the vast majority of class members. They then file suit seeking certification of as large a class as possible, often obtaining an *ex parte* "conditional" certification before the defendant has even been

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[1] State Farm is a mutual insurance company. It has no parent company and no subsidiaries that are not wholly owned.

served. Having hand-picked a forum known to be hospitable to plaintiffs' lawyers, class counsel generally are able to achieve an "unconditional" class certification and then, using the threat of a single jury holding the financial fate of the defendant company in its hands, extort a settlement without the defendant ever having a realistic chance to refute the class's claims in court.

This familiar pattern is in the process of playing itself out in the small courtroom of an associate circuit court judge in Marion, Illinois (population 14,545), 146 miles from the State's capital and over 300 miles from its largest city. A consortium of plaintiffs' lawyers from around the country filed a 48-state class action there, alleging that State Farm's practice of sometimes specifying the use of parts manufactured by sources other than the original equipment manufacturer ("non-OEM parts") when adjusting claims for damage to insured vehicles constitutes a breach of State Farm's insurance agreements with its policyholders and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Illinois CFA"). This suit is proceeding in defiance of the insurance statutes and regulations of numerous States that either permit or require insurers to specify non-OEM parts and in the face of consumer groups' support of the use of non-OEM parts as a way of holding down the cost of insurance. True to form, within hours of filing the lawsuit class counsel first obtained an *ex parte* "conditional" class certification, which, after a hearing, was formalized via an opinion that deviates only minimally from the proposed order supplied by class counsel to the trial court. The class is estimated to have five million members, and class counsel assert that their claims are worth in excess of $2 billion.

The five million class members have myriad makes and models of automobiles, and literally thousands of different non-OEM parts were specified in the five million repair estimates. Nevertheless, in obtaining certification of this behemoth of a class, counsel persuaded the trial court that the millions of fact-specific breach of contract and consumer fraud claims could be litigated without requiring class members to demonstrate the inadequacy of the particular non-OEM parts specified in their repair estimates and without affording State Farm the opportunity to put on a defense as to the individual class members' various claims. They also persuaded the court that the Illinois CFA could be applied to the

claims of every class member, wherever that class member resides, because State Farm is headquartered in Illinois (although, it bears mention, nowhere near Marion). And finally, in order to spare themselves the expense and, at the same time, maximize the size of the class and hence its potential as a tool of extortion, they prevailed upon the trial court to require only a publication notice to the class even though it is possible to identify with certainty and provide actual written notice to approximately 1.8 million class members.

Having fended off State Farm's mandamus petition in the Illinois Supreme Court, class counsel have positioned themselves to subject State Farm to the classic class action dilemma — either pay the protection money they demand in the form of a settlement or risk a ten-digit judgment and injunction that would force State Farm to abandon a policy that has been endorsed by consumer groups and approved or required by legislatures and insurance commissioners throughout the country.

The dilemma in which State Farm has been placed is the product of multiple constitutional violations. This Court's precedents make it clear that state courts may not apply forum law to regulate transactions that have no connection to the forum, thereby impeding the flow of commerce elsewhere in the Nation; that defendants may not be deprived of the right to defend claims brought against them (even if doing so would facilitate the management of the case); and that, in a class action seeking predominantly monetary relief, actual notice must be given to all class members who are readily identifiable, even if doing so would be expensive for class counsel. Regrettably, disregard of these strictures has become commonplace in state court class actions, in which the financial interests of the class action lawyers have increasingly received the highest priority.

Because this case is representative of several recurring abuses in class action litigation, it provides a useful and appropriate vehicle for addressing a serious and growing constitutional problem that, as a consequence of the immense pressure to settle certified class actions, has consistently evaded post-judgment review.

1. *State Farm's non-OEM parts program.* For many years, State Farm has sought to contain insurance costs in a variety of

ways, including by encouraging competition in the automobile repair parts industry. State Farm has attempted to further this competitive objective within the express limits of the laws of the 50 States by providing in most of its policies that it may specify non-OEM repair parts when doing so would restore vehicles to their "pre-loss condition." R. Ex. 20 (Truttmann Aff.) ¶¶ 6, 9.[2] In the vast majority of States, State Farm's policy language expressly authorizing the specification of non-OEM parts has been reviewed and approved by the State's insurance commissioner to ensure conformity with the law of that State; several other States prescribe the policy language themselves. *Id.* ¶ 3.

Many of the categories of "crash parts" (fenders, hoods, bumper covers, and the like) that are at issue in this proceeding have been tested and inspected by the Certified Automotive Parts Association ("CAPA"), an independent organization that certifies the quality of crash parts used for auto body repairs. With respect to the many categories of parts that are subject to CAPA certification, State Farm will specify only those non-OEM parts that CAPA has certified. App., *infra,* 9a; R. Ex. 21 (Gibson Aff.) ¶¶ 15-17; Tr. 84-85, 409. In addition, State Farm guarantees in writing free replacement or repair of any non-OEM parts specified by State Farm that do not satisfy the policyholder. R. Ex. 21 ¶¶ 19-21; Tr. 82. It also offers policyholders the option of paying the difference in price in order to receive an OEM part. R. Ex. 21 ¶ 6.

Major consumer organizations, including the Consumers Union, the Consumers Federation of America, and the Center for Auto Safety, support State Farm's practice of specifying non-OEM parts because it significantly promotes policyholder interests. Tr. 213-214, 219-220. One consumer advocate and self-described "outspoken critic" of the insurance industry testified at the class certification hearing that "the insurance companies, and in this case, State Farm, are on the side of the angels." Tr. 213. The reason is simple. So long as insurers specify only OEM parts, the original manufacturers enjoy an absolute monopoly; they can, and will, charge monopoly prices for the parts. When, by contrast,

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[2] "R. Ex. __" refers to the record excerpts from the second mandamus proceeding in the Illinois Supreme Court; "Tr. ___" refers to the transcript of the class certification hearing.

non-OEM parts can be used, the original manufacturers lose their monopolies and must either price their parts competitively or risk a substantial diminution in their parts sales. Tr. 210-211, 216-220.

Precisely because non-OEM parts play a significant role in reducing the cost of auto repairs, many States, including Illinois, expressly authorize insurers to specify the use of non-OEM parts. Massachusetts actually *mandates* the specification of non-OEM parts in many circumstances. And Hawaii encourages the use of such parts by requiring insureds to pay the price differential if they insist on receiving OEM parts. See note 7, *infra*.

2. *The filing of this class action.* This action was filed in July 1997 in Marion, Illinois, on behalf of a purported class consisting of State Farm policyholders in 48 States.[3] Notwithstanding the express language in State Farm's policies authorizing the use of non-OEM parts, the complaint alleged that each of the tens of thousands of distinct non-OEM crash parts available for vehicle repairs is defective and inferior to its OEM counterpart and that every time State Farm specified the use of non-OEM parts it necessarily breached its obligation to restore the insured's vehicle to its pre-loss condition. The complaint was subsequently amended to add the allegation that State Farm's specification of non-OEM parts violates the Illinois CFA and to seek an injunction against any future specification of non-OEM parts.

The class's claims depend entirely on the allegation that *all* non-OEM parts are categorically inferior to the corresponding OEM parts. But testimony by an automotive engineering and design expert at the class certification hearing established that there is no basis for such a generalization and that an individualized inquiry is necessary to evaluate each part and hence each insured's claim. In particular, the expert testified without contradiction that there are over 33,000 separate and unique non-OEM crash parts produced by scores of manufacturers from all over the world; test results on one type of part (such as a fender) cannot be generalized to another

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[3] Class counsel excluded Arkansas and Tennessee from the class definition because one of them has filed statewide class actions in those States raising identical claims. The federal court in Tennessee has denied certification (see page 18, *infra*), and the Arkansas court has not yet ruled.

type of part (such as a hood); testing by OEM manufacturers themselves shows that the vast majority of non-OEM parts perform comparably to or better than OEM parts; both non-OEM and OEM parts vary significantly in quality and performance, so that only individualized testing and analysis can determine the quality and performance of any particular part; and whether a vehicle is restored to its "pre-loss condition" depends on many factors, including the condition of the vehicle before the loss, the quality of the make and model, the mileage and age of the vehicle, the nature of the damage sustained, and the competence of the repair shop. Tr. 221-222, 246-247, 250-251, 255, 455-461, 516-517, 560-561, 580-581, 590-597, 606, 613-618. In refusing to certify even a single-state class action, a federal court in Tennessee has made the same point. See page 18 & note 10, *infra*.

3. *Proceedings below.* State Farm opposed class certification, arguing that the proposed class did not satisfy the requirements of the Illinois class action statute, which is modeled on Fed. R. Civ. P. 23,[4] and that application of Illinois law to the claims of a nationwide class would violate State Farm's right to due process and unconstitutionally project Illinois law into other States. On December 5, 1997, in an opinion lifted almost verbatim from class counsel's proposed order, the circuit court rejected these arguments and certified a class of upwards of 25 million people, consisting of all State Farm policyholders in 48 States who had *any* kind of non-OEM part designated in a repair estimate. App., *infra,* 16a-17a.[5]

The court found that a 25-million-member class action could be manageably litigated because the class members' claims could be proven "on a class-wide basis," with the need for individualized proof limited to the issue of damages. *Id.* at 15a. It ignored State Farm's contention that each class member had to prove that the particular non-OEM parts specified in his or her repair estimate were incapable of restoring the class member's vehicle to its pre-loss condition and that State Farm had the right to introduce

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[4] 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 13.04, at 13-19 & App. 13-1, at 13-144 (1992).

[5] The class definition purported to carve out certain members of pre-existing California and Illinois settlement classes. App., *infra,* 17a.

evidence specific to each class member to prove the adequacy of the particular parts for the particular repair. The court also ruled that the Illinois CFA constitutionally may be applied to the claims of every class member, no matter where the particular insurance transaction or repair took place, simply because State Farm is headquartered in Illinois. *Id.* at 10a-11a.

On December 23, State Farm petitioned the Illinois Supreme Court for a writ of mandamus and/or prohibition or, in the alternative, for a supervisory order, contending, *inter alia*, that the certification order violated State Farm's due process rights and infringed the sovereignty of Illinois' sister States. That court issued an order on January 21, 1998, stating that there were insufficient votes either to grant or to deny the petition.

Meanwhile, class counsel retreated from their claim that *all* non-OEM parts were defective, now limiting their allegations to non-OEM *crash* parts. The circuit court adopted their redefinition and amended the class certification order on February 11, 1998. *Id.* at 18a-20a. The revised class includes about 5,000,000 policyholders (assuming the uniform application of Illinois' ten-year statute of limitations for contract claims regardless of where each class member's claim arose). *Id.* at 26a.

The battleground then shifted to the issue of class notice. Because State Farm could identify approximately 1,800,000 class members from its computerized repair records, it argued that class counsel should be required, at a minimum, to provide individual, mailed notice to those 1.8 million people.[6] Unwilling to bear the

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[6] The list of 1.8 million policyholders would have been compiled from State Farm's electronic estimating system, which includes the information necessary to distinguish repairs involving non-OEM crash parts from those not involving such parts. Because the electronic estimating system generally is not used for small claims involving only a few replacement parts, the remaining members of the class cannot be identified using this system. However, State Farm does have records of every repair since 1987 and stands ready to compile an overinclusive list of all insureds who received handwritten estimates specifying the use of crash parts (whether OEM or non-OEM). See App., *infra*, 26a. Thus, by use of this overinclusive list, actual notice could have been provided to every member of the class at his or her last-known address.

costs and administrative responsibility for the enormous class that they claim to represent, class counsel instead proposed publication of a brief notice in a variety of newspapers and magazines. State Farm objected to this notice plan on the ground, among others, that it violated the fundamental right of identifiable class members to individual notice and therefore exposed State Farm to further litigation even were it to prevail on the merits in this case.

On February 25, 1998, the circuit court adopted class counsel's notice plan. In an opinion that was drawn virtually verbatim from class counsel's proposed order, the court rejected State Farm's argument that due process requires individual notice to identifiable class members, concluding — amazingly — that class members are more likely to read legal notices in newspapers and magazines than they are to read a notice printed on official court letterhead and delivered by mail to their homes in embossed court envelopes. App., *infra,* 24a-25a, 27a-28a.

After being denied the right to file an interlocutory appeal, State Farm again sought a writ of mandamus and/or prohibition or, in the alternative, a supervisory order from the Illinois Supreme Court, this time challenging both the class certification order as amended and the circuit court's notice order. That petition was denied without comment on March 24, 1998. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

This Court has expressed concern about the "vexatiousness" of securities class actions and the possibility that they can be used to extort settlements that are "out of any proportion to [the class's] prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 739-743 (1975). Today, this problem extends far beyond securities fraud cases, besieging large interstate companies with respect to many different areas of business activity. Put bluntly, the nationwide class action in state court has become the weapon of choice for those who seek to use the judicial system as a means of extorting multi-million dollar settlements from deep pocket defendants.

The present case illustrates many of the abuses for which class action practice has become infamous. In a procrustean effort to make this case fit into the class action mode, the trial court has

violated the sovereignty of Illinois' sister States, impeded interstate commerce, and abridged the due process rights of State Farm and the absent class members by insisting on applying Illinois law to the claims of non-Illinois class members whose insurance policies were issued in, and either approved or specifically prescribed by, other States. The court also violated State Farm's right to procedural due process by certifying a five-million-person class action that can be manageably tried only by relieving the class members of their burden of proving that the particular non-OEM parts specified in their repair estimates failed to restore their vehicles to pre-loss condition and by depriving State Farm of the opportunity to defend itself by demonstrating the contrary. And the court has violated the due process rights of both the absent class members and State Farm by allowing class counsel to avoid the expense of providing class members with the actual written notice required by this Court's precedents.

To be sure, this Court does not ordinarily agree to review lower court rulings when further proceedings below are anticipated. But class action litigation differs radically from ordinary cases. See *Blue Chip Stamps*, 421 U.S. at 740 (noting that the concern about vexatious litigation in securities class actions "is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them"). Because the stakes are so high, there is huge pressure to settle rather than roll the dice with a jury. Accordingly, the failure to review an erroneous certification before trial generally precludes any review. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). As for the trial court's ruling authorizing notice by publication only, immediate review is necessary because waiting until after trial would give the class the very kind of unfair "one-way intervention" that the notice requirement is designed to prevent. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974).

The decision below reflects a widespread lack of clarity (to put it charitably) concerning the constitutional requirements for — and limits on — certification and management of nationwide classes by state courts. This Petition presents the Court with an ideal opportunity to provide needed guidance regarding those important requirements and limitations.

I. THE CIRCUIT COURT'S CLASS CERTIFICATION AND NOTICE ORDERS CANNOT BE SQUARED WITH THIS COURT'S PRECEDENTS

A. Application Of The Law Of State Farm's Domicile To The Claims Of All Class Members Unconstitutionally Projects Illinois' Regulatory Powers Beyond Its Borders.

1. In a wide range of contexts and under various constitutional provisions (including the Due Process, Full Faith and Credit, and Commerce Clauses), this Court consistently has rejected state efforts to apply local law to transactions that occurred entirely in other States. See, *e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-573 (1996) (Alabama jury could not apply Alabama law to punish defendant for transactions taking place in other States); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders"); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 582-583 (1986) (rejecting New York's attempt to "project its legislation" into other States); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-823 (1985) (Kansas court could not apply forum law to claims of class members that had no connection with Kansas); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-643 (1982) (plurality op.) (Illinois anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends."); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("[n]o State can legislate except with reference to its own jurisdiction").

Two of these cases — *Shutts* and *BMW* — are especially salient here. *Shutts* was a class action filed in Kansas on behalf of residents of all 50 States against a lessee of oil and gas properties located in 11 States. In an effort to facilitate adjudication of the case as a nationwide class action, the trial court applied Kansas law to every plaintiff's claim without regard to that plaintiff's State of residence or the location of the property that was the subject of the claim. Noting that "[t]here is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control," the Court held that the application of Kansas law to claims that had nothing to do with Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits" imposed by the Due Process and Full Faith and Credit Clauses. 472 U.S. at 822. The Court emphasized that "Kansas 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Ibid.* (quoting *Home Ins. Co. v. Dick,* 281 U.S. 397, 410 (1930)). It concluded that these "constitutional limitations * * * must be respected even in a nationwide class action." *Id.* at 823.

In *BMW,* this Court held that an Alabama jury could not punish the defendant under that State's general fraud law for vehicle transactions that had no connection to Alabama. As in the present case, many of the other States had statutes authorizing the very conduct that the Alabama jury had deemed wrongful. This Court found Alabama's effort to dictate standards of conduct in other States irreconcilable with principles of federalism, explaining: "[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. * * * [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States." 517 U.S. at 572 (footnotes omitted).

The trial court's attempt to make a nationwide class action manageable by applying the Illinois CFA to the claims of all of the five million class members is in irreconcilable conflict with *Shutts, BMW,* and the rest of the Court's long line of precedents in this area. As envisioned by the McCarran-Ferguson Act, 15 U.S.C. § 1011, the business of insurance is regulated "by the several States," with different States adopting varying approaches and policies. Of particular relevance here, many States have statutes or regulations

that specifically authorize, encourage, or even require the specification of non-OEM parts, and, consistent with these statutes and regulations, have reviewed and approved State Farm's policy language permitting it to specify the use of such parts.[7] The circuit

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[7] Massachusetts mandates that non-OEM parts "shall be used" except in specific limited circumstances (Mass. Regs. Code tit. 211, § 133.04), and Hawaii strongly encourages the use of non-OEM parts by requiring insureds to pay the price differential if they insist on receiving OEM parts (Haw. Rev. Stat. Ann. § 431:10C-313.6(a)). Many other States permit the use of non-OEM parts if disclosed to the insured. See Ariz. Rev. Stat. § 20-461; Cal. Code Regs. tit. 10, § 2695.8(f); Colo. Rev. Stat. § 10-3-1305; Conn. Gen. Stat. Ann. § 38a-355; Ga. Code Ann. § 33-6-5(13); Idaho Code § 41-1328D; 215 Ill. Comp. Stat. 5/155.29, Ill. Admin. Code tit. 50, § 919.80(d)(5); Kan. Stat. Ann. § 50-661; La. Rev. Stat. Ann. § 51.242; Mich. Comp. Laws § 257.1363; Miss. Code Ann. § 63-27.5; Mo. Code Regs. Ann. tit. 20, § 100-1.050(2)(D); 210 Neb. Admin. R. & Regs. § 45-006; Nev. Admin. Code ch. 686A, § 240; N.H. Stat. ch. 407-D; N.J. Admin. Code tit. 11, § 2-17.10(a)(11)-(13); N.Y. Comp. Codes R. & Regs. tit. 9, § 216.7(b)(5); N.C. Reg. 4.0426-4.0427; Ohio Rev. Code Ann. § 1345.81(B); Okla. Stat. tit. 15, § 955; S.D. Codified Laws § 58-33-71; Tenn. Comp. R. & Regs. tit. 0780, ch. 1-59-.04; Utah Code Ann. § 31A-22-319; Va. Code Ann. § 38.2-510(C); Wis. Stat. Ann. § 632.38. Some States permit the use of non-OEM parts even without disclosure. See 806 Fla. Admin. Code Ann. r. 4-166.027(10); Ky. Admin. Regs. 12:095 § 7(d)(9); Md. Code Ann. [Insurance] § 27-906. Some States permit the use of non-OEM parts if the insured consents. See R.I. Gen. Law § 27-10.2-2; Wyo. Ins. Dept. Reg. XIX §§ 2, 6. Other States require consent only during a limited time period. See Ark. Code Ann. § 4-90-306 (while vehicle is under original warranty); Ind. Code Ann. § 27-4-1.5-8(b) (five years); W. Va. Code § 46A-6B-3 (during year of manufacture and succeeding two years). One State requires consent only if non-OEM parts have not been certified by an independent test facility. Or. Rev. Stat. § 746.287.

Moreover, unlike in Illinois, the consumer fraud laws of many States do not encompass claims arising out of insurance contracts, which are instead left to the regulatory purview of the insurance commissioner. See, *e.g.*, *West v. Fireman's Fund Ins. Co.*, 683 F. Supp. 156, 156-157 (M.D. La. 1988); *O.K. Lumber Co. v. Providence Washington Ins. Co.*, 759 P.2d 523, 528 (Alaska 1988); *Ferguson v. United Ins. Co. of Am.*, 293 S.E.2d 736, 737 (Ga. Ct. App. 1982); *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981). More generally, the consumer fraud

court's choice-of-law decision overrides the policies of those States and arrogates to itself the power to effectuate a nationwide condemnation of the use of such parts. If that court were to find that the use of non-OEM parts does violate the Illinois CFA, and if its choice-of-law ruling were allowed to stand, State Farm (and all other insurers domiciled in Illinois) would be compelled to discontinue the specification of non-OEM parts nationwide whether or not legislatures and insurance regulators in other States deem the use of such parts desirable. Nothing could be more intrusive to the sovereignty of Illinois' sister States, more corrosive of the federal system, or more squarely in conflict with *BMW*.

The trial court's decision to give nationwide extraterritorial effect to the Illinois CFA also directly conflicts with *Shutts*. Just as Kansas had no stake in whether Phillips should pay interest on delayed royalty payments to non-Kansans whose property was located outside of Kansas, Illinois has no legitimate interest in whether State Farm specifies the use of non-OEM parts for repairs made to vehicles owned by residents of other States pursuant to policy language that was reviewed and approved by the insurance regulators in those States. For Illinois to apply its law under such circumstances squarely violates the Full Faith and Credit Clause.

Furthermore, just as neither Phillips nor the non-Kansan class members could have anticipated that Kansas law would apply to

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laws of the various States differ significantly. See, *e.g.*, *In re Stucco Litig.*, 175 F.R.D. 210, 217 (E.D.N.C. 1997) (reviewing differences among States' consumer fraud statutes and denying certification of nationwide class in part because these differences, as well as differences in other applicable laws, would render class action unmanageable); *Tylka* v. *Gerber Prods. Co.*, 1998 WL 93277, at *4 (N.D. Ill. Mar. 3, 1998) (refusing to certify putative nationwide class action alleging violation of consumer fraud laws of the 50 States because "a brief review of the applicable statutes reveals not only [different] nuances, but differing standards of proof, procedure, substance, and remedies"). The stark contrast between the decision in *Tylka* by an Illinois federal court and that of the Illinois state courts in this case illustrates the widening gulf between federal and state courts regarding the appropriate limits on certification of multistate classes. The constitutional standards governing this question are (or should be) the same in state and federal court, and any distinction can only encourage further forum shopping by class action lawyers.

their disputes, neither State Farm nor out-of-state class members reasonably could have expected that Illinois consumer fraud law would govern any disputes between them. After all, the claim of a typical member of this putative class would involve a repair in, for example, Hawaii to a Hawaii resident's car pursuant to an insurance policy that was approved by Hawaii's insurance commissioner. Application of Illinois law to such a claim would constitute adjudication by ambush. There can be no serious doubt that, if an individual claim of this sort were brought in Hawaii (or even in Illinois), the court would apply Hawaii law.[8] In these circumstances, it can only be deemed "arbitrary and unfair" and a gross violation of due process for an Illinois court to apply Illinois law to the claims of non-resident class members merely because it would facilitate litigation of the case as a class action.

Finally, a verdict against State Farm under Illinois law would require it to violate the mandates of other States, such as Massachusetts and Hawaii. The untenable situation that this would create constitutes a wholly unacceptable burden upon the conduct of interstate commerce. See, *e.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-530 (1959).

2. The circuit court held that it could constitutionally apply Illinois' consumer fraud statute to the claims of all five million class members simply because "State Farm is situated and headquartered in Illinois and affirmatively uses Illinois courts and law." App., *infra*, 11a. This ruling implicates a split between the federal and state courts on this issue.

As far as our research has disclosed, every federal court to consider the question has held that it is impermissible to apply a

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[8] See *Okada v. MGIC Indem. Corp.*, 823 F.2d 276, 280 (9th Cir. 1986) ("Hawaii courts apply Hawaii state law when the acts covered by the policy occur in Hawaii, the insureds are Hawaii citizens, and the insurance company is not a Hawaii citizen."); see also *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 829 F.2d 227, 248 (1st Cir. 1987) (applying Ohio law where policy was issued in Ohio by Illinois-based insurer to Ohio-based company to cover risks arising in Ohio); *Northwestern Mut. Life Ins. Co. v. Wender*, 940 F. Supp. 62, 66-67 (S.D.N.Y. 1996) (New York law applies when policy is issued in New York notwithstanding fact that insurer is incorporated in Wisconsin).

single State's law in a nationwide class action simply because the defendant is headquartered in that State. See *Poe v. Sears, Roebuck & Co.*, 1998 WL 113561, at *4 (N.D. Ga. Feb. 13, 1998) (under *Shutts*, applying the law of the State in which the defendant is headquartered "would not pass constitutional muster"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997) (as a matter of both choice-of-law principles and due process, the fact that the defendant is headquartered in Michigan does not justify applying only Michigan law in 50-state class action); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (under *Shutts*, Michigan law may not be applied in nationwide class action even though the defendant is headquartered in Michigan); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423 (E.D. La. 1997) (under applicable choice-of-law principles, the fact that defendant's primary place of business is in Illinois does not justify applying Illinois law to the claims of all members of a 50-state class); *Endo* v. *Albertine*, 1995 WL 170030, at *5 (N.D. Ill. Apr. 7, 1995) (fact that Illinois is defendant's primary place of business is not adequate under *Shutts* to justify applying Illinois law to claims of out-of-state class members).

The state courts, however, are divided on this issue. At least one other state court has agreed with the trial court's approach in this case and deemed the presence of the defendant's headquarters in the forum State sufficient for application of forum law in a nationwide class action. See *Clothesrigger, Inc.* v. *GTE Corp.*, 236 Cal. Rptr. 605, 608-609 (App. 1987). On the other hand, one state court has taken the same position as the federal courts. See *Duvall* v. *TRW, Inc.*, 578 N.E.2d 556, 559 (Ohio App. 1991) ("the fact that TRW is incorporated and headquartered in Ohio" is "an insufficient basis for applying Ohio law to these potential out-of-state class members").

In any event, the trial court's ruling cannot be squared with either the state sovereignty concerns underlying the Full Faith and Credit and Commerce Clauses or the fairness concerns underlying the Due Process Clause. As to the former, because the regulation of insurance is committed to the *several* States (the vast majority of which have enacted laws governing the specific practice at issue), the fact that State Farm is domiciled in Illinois is not a constitution-

ally sufficient basis for giving nationwide reach to Illinois' policy preferences (or, to be more accurate, those of one Illinois judge). Under the Full Faith and Credit Clause, Illinois may not apply its law to claims or cases in which it has no legitimate interest, and Illinois cannot claim such an interest with respect to insurance transactions conducted outside Illinois under the regulatory authority of other States simply because the defendant happens to be domiciled in Illinois. See *Shutts*, 472 U.S. at 821-822. Under the Commerce Clause, Illinois is forbidden to dictate to other States how business should be conducted there and cannot impose restraints, even on its own citizens, that would needlessly restrict commerce in those other States. See *MITE Corp.*, 457 U.S. at 640-646 (holding that Illinois' anti-takeover statute, which interfered with the offeror's tender for shares held by non-Illinois residents, violated Commerce Clause even though it was being applied to a tender offer for an Illinois corporation).

Nor could nationwide application of Illinois law be said to be within "the expectation of the parties," which this Court has indicated is "an important element" of the due process analysis (*Shutts*, 422 U.S. at 822). As explained above, any dispute between State Farm and an out-of-state policyholder regarding a claim adjusted in that policyholder's State of residence has *invariably* been governed by the law of that State; that State Farm is domiciled in Illinois would give neither State Farm nor anyone else involved reason to believe that the suit would be resolved under Illinois law, just as no one would expect a court to apply Massachusetts' statute requiring the specification of non-OEM parts when a Massachusetts-based insurer adjusts the claim of an Illinois policyholder in Illinois.[9]

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[9] It merits noting that nationwide application of the law of the State in which the defendant is domiciled would rarely be advantageous to all class members and often would be prejudicial to the majority of them. For example, many manufacturing entities are located in Michigan, a State that permits punitive damages only to the extent that compensatory damages are not sufficient to make the plaintiff whole (see, *e.g.*, *Thompson v. Paasche*, 950 F.2d 306, 314 (6th Cir. 1991)). It would hardly be beneficial for customers from jurisdictions with more liberal punitive damages regimes to be clumped into a nationwide class whose claims against a Michigan manufacturer are to be tried exclusively under

The Court should grant certiorari to clarify that courts may not constitutionally apply the law of the defendant's domicile to claims arising out of transactions that occurred entirely in other States.

B. Trial Of The Case On The Basis Of Class-Wide Evidence, Without Individualized Proof Establishing The Inadequacy Of The Particular Non-OEM Parts Specified In Particular Class Members' Repair Estimates, Violates Due Process.

It is undisputed that there are tens of thousands of different non-OEM crash parts manufactured by scores of different companies around the world. Determining whether any particular non-OEM part is incapable of restoring a vehicle to its pre-loss condition requires analysis of the specific part (as well as consideration of the vehicle's condition and the skill of the repair shop). Thus, for example, even if class counsel could prove that a replacement hood manufactured by X Co. in Thailand for the 1993 Honda Accord sedan is inadequate because it does not close properly, that would in no way establish (i) that X Co.'s replacement hood for a 1989 Cadillac Deville coupe fails to close properly and hence is inadequate, (ii) that a non-OEM replacement hood manufactured by Y Co. in Japan for the 1993 Honda Accord sedan is inadequate in any way, (iii) that X Co.'s replacement fenders for the 1993 Accord, 1989 Cadillac, or any other vehicle are inadequate in any way, or (iv) that Y Co.'s replacement fenders for Accords, Cadillacs, or other vehicles are inadequate.

Were an individual policyholder to sue State Farm for breach of contract or consumer fraud arising out of the specification of a supposedly inferior non-OEM part, that policyholder undeniably would have the burden of establishing that the particular non-OEM part specified in his or her repair estimate failed to restore his or her vehicle to its pre-loss condition. State Farm would then be entitled to put into evidence exemplars of the non-OEM part specified in the repair estimate and its OEM counterpart, introduce results of tests performed on those parts, and adduce testimony of metallurgists, automotive engineers, and appraisers to compare the durability of the parts at issue and the effect of their use on resale

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Michigan law.

value. In addition, State Farm would be entitled to introduce evidence of the vehicle's pre-loss condition (which might well have been less than pristine), the competence of the repair shop, and any other evidence tending to show that the vehicle was in fact restored to its pre-loss condition or that any failure to meet that standard was not attributable to the use of a non-OEM part.

These rights may not be cast aside simply because it would otherwise be impossible to conduct a manageable class action. Indeed, it is for this very reason that other courts faced with precisely the same attack on the specification of non-OEM parts have refused to certify even *statewide* classes. See *Murray v. State Farm Mut. Auto. Ins. Co.*, No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Ins. Co.*, No. 94 CH 11396 (Cook Cty. Cir. Ct. Jan. 27, 1998); see also *Moorhead v. State Farm Mut. Auto. Ins. Co.*, No. 95-AR-0668-S, Order at 6 (N.D. Ala. Sept. 12, 1997) (refusing to certify class because of inadequacy of class representatives, but indicating doubt as to whether the class claims satisfied the commonality requirement).[10] The circuit court's contrary determination in this case that trial can be conducted

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[10] The *Murray* court explained:

> Although there may be questions of fact as to whether a particular non-OEM crash part is inferior to its OEM counterpart, those questions are certainly not common. In fact, as defendants explain, this determination, given the differences in vehicle makes and models and the fact that there are several manufacturers of non-OEM crash parts, would require the testing of thousands of individual crash parts. * * *
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> [I]t is clear that given the variety of vehicle makes, models, and years, the different types of crash parts, and the number of part manufacturers, it cannot be said that common issues predominate over the individual issues. * * *
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> [I]t is clear that the difficulties likely to be encountered in the management of a class action would be great and would, in essence, require hundreds or thousands of mini-trials in order to determine if plaintiffs were entitled to recover.

Order Denying Plaintiff's Motion for Class Certification at 15, 25, 26. A copy of this Order has been lodged with the Clerk of this Court and served on respondents.

without consideration of individualized proof and without affording State Farm the opportunity to defend the claims as it would in an individual case is in conflict with this Court's general due process precedents as well as with the consistent rulings of the federal courts in the class action context.

This Court repeatedly has stated that "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); see also *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause"). That due process right may not be abridged through the class action device any more than it may be eviscerated through any other state procedure. As this Court recently recognized, under federal procedure, class actions are permitted to "'achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated,'" but only when those goals can be achieved "'*without sacrificing procedural fairness* or bringing about other undesirable results.'" *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997) (emphasis added); cf. *Shutts*, 472 U.S. at 821 ("the question of the constitutional limitations on choice of law * * * is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum"). It goes without saying that the due process requirement of "procedural fairness" adverted to in *Amchem* applies with full force in state-court class actions. See, *e.g.*, *Shutts*, 472 U.S. at 818-823 (applying due process limitations on choice of law in state court class action); *cf. Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

By the expedient of class certification, the circuit court in this case has relieved the class members of the burden of making the showing that would be required in any individual case and has deprived State Farm of the right to make the kind of defense it would be entitled to make in an individual case. As several federal courts have recognized, such an approach runs roughshod over the defendant's due process right to defend itself. See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990); *Western Elec. Co. v. Stern*,

544 F.2d 1196, 1199 (3d Cir. 1976); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 487-489 & n.21 (E.D. Pa. 1997); *Masonite*, 170 F.R.D. at 425; *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372 (D.N.J. 1987), mandamus granted on other issues, 855 F.2d 1062 (3d Cir. 1988). The Court should grant certiorari to confirm that a defendant's right to procedural due process may not be compromised through the class action device, however expedient that may appear to the trial court and class counsel.

C. The Trial Court's Order Excusing Class Counsel From The Obligation To Provide Actual Notice To Identifiable Members Of The Class Presents An Important Issue Worthy Of Immediate Review.

1. In a wide range of contexts, including class actions seeking monetary relief, this Court has "adhered unwaveringly" to the principle that, when the names and addresses of interested parties are readily identifiable, publication notice is a constitutionally inadequate means of informing them of the existence of a proceeding that will affect their rights: the Due Process Clause requires that such parties be afforded actual notice by means of either personal service or mailed notice. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-797 (1983). Accord, *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-175 (1974); *Schroeder v. City of New York*, 371 U.S. 208, 211-213 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112, 115-116 (1956); *City of New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296 (1953); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Shutts*, 472 U.S. at 811-814 (due process does not require opt-in procedure when class members have received *actual notice* of the class action and the opportunity to opt out).[11]

In *Eisen*, the Court considered the notice requirement in the context of a federal class action, holding that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." 417 U.S. at 173.

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[11] The notice requirements may be less stringent in non-opt-out class actions seeking predominantly non-monetary relief. Our arguments here are limited to class actions seeking predominantly monetary relief.

Although this conclusion was based on the language of Fed. R. Civ. P. 23(c)(2), which requires that class members be provided "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort,*" the Court emphasized that that provision was "'designed to fulfill the requirements of due process to which the class action procedure is of course subject.'" 417 U.S. at 173 (quoting Advisory Committee Note). In requiring individual notice, the Advisory Committee was guided by *Mullane*'s holding that "publication notice could not satisfy due process where the names and addresses of the [affected individuals] were known." *Id.* at 173-174. Endorsing that view, the *Eisen* Court stated: "In such cases, 'the reasons disappear for resort to means less likely than the mails to apprise them of an action's pendency.'" *Id.* at 174-175 (quoting *Mullane,* 339 U.S. at 318) (alterations deleted). As further support, the *Eisen* Court invoked *Schroeder* — another due process case — which, it noted, "explained that *Mullane* required rejection of notice by publication where the name and address of the affected person were available." *Id.* at 175.

By relying on *Mullane, Schroeder,* and the Advisory Committee Note, *Eisen* makes clear that individual notice is a requirement of due process, not just Rule 23. Any doubt on that score was removed in *Shutts,* which was a state-court class action. The defendant argued that the state court could not exercise personal jurisdiction over class members who had not affirmatively indicated an intention to be bound by the judgment by "opting in" to the class. This Court disagreed, holding that so long as class members received notice and an opportunity to "opt out," it was permissible for the forum to exercise jurisdiction over the absent class members. Citing *Mullane* and *Eisen,* the Court stated that "[t]he notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 472 U.S. at 812 (internal quotation marks omitted). Turning to the facts of the case, the Court found due process satisfied by "the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to 'opt out.'" *Ibid.* In short, after *Shutts* it is (or at least

should be) clear that the minimum acceptable notice requirements are one and the same in state and federal court.

On the basis of these cases, State Farm argued below that class counsel had to attempt to provide actual notice at least to the 1.8 million class members whose names and addresses can be identified from State Farm's computerized database.[12] In addition, although the remaining class members could not be identified with specificity from State Farm's records, State Farm stood ready to supply a list of all State Farm insureds since 1987 whose estimates included one or more crash parts, whether OEM or non-OEM. See note 6, *supra*. Use of this list would have given actual notice to the maximum number of class members. But whether or not providing actual notice to everyone on this overinclusive list is constitutionally required (an issue that this Court has not definitively resolved), the trial court's refusal to require that actual notice be provided *to anyone* is utterly irreconcilable with *Mullane* and its progeny.

2. The trial court's reasons for refusing to require actual notice patently conflict with this Court's precedents and serve to underscore the need for immediate review. The trial court's principal rationale was its conclusion that mailed notice would be no more effective than publication notice. App., *infra*, 24a-25a, 27a-28a. In so stating, the trial court ignored not just State Farm's evidence but also this Court's repeated conclusion — which is even truer in today's era of reduced newspaper subscribership — that publication notice is "a poor substitute for actual notice." *Eisen*, 417 U.S. at 175; see also *Walker*, 352 U.S. at 116 ("It is common knowledge that mere newspaper publication rarely informs a landowner of

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[12] Because inadequate notice would provide grounds for class members to escape the binding effect of any judgment, State Farm unquestionably is entitled to challenge the adequacy of the notice provided to class members. See *Shutts*, 472 U.S. at 805 ("Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound. The only way a class-action defendant * * * can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.").

proceedings against his property."); *New York, N. H. & H. R. Co.*, 344 U.S. at 296 ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice."); *Mullane*, 339 U.S. at 315 ("It would be idle to pretend that publication alone * * * is a reliable means of acquainting interested parties of the fact that their rights are before the courts."); *id.* at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."). If there were any reason to retreat from this Court's long-standing view that publication notice is an inadequate substitute for actual notice, it should be done by this Court, not a trial judge in Marion, Illinois, in a class action that purports to bind 5 million people.

The trial court also sought to justify its refusal to require actual notice on the ground that State Farm could identify "only" 1.8 million class members with specificity and that some percentage of those class members might have moved after discontinuing their policies with State Farm, making it less likely that mailed notice would actually reach them. App., *infra*, 25a-27a. While this is a good reason to require publication as a supplement to direct mailings, it is utterly mystifying why it should excuse a failure even to attempt actual notice, which undeniably would be effective to reach a substantial majority of the identifiable class members.[13]

Finally, the trial court's assertion (App., *infra*, 29a-30a) that *Eisen* is based exclusively on the language of Fed. R. Civ. P. 23 and hence has no application in a state court class action is, as demonstrated above, utterly untenable. To the extent there is any question on this score, however, it is one that warrants review and resolution by this Court.

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[13] Indeed, *Eisen* implicitly rejects both grounds. In that case, the Court required that individual notice be mailed to the 2.25 million class members who were "easily ascertainable" even though another 3.75 million class members could not be identified and even though it was virtually certain that the addresses for some significant number of the 2.25 million class members would not be current. 417 U.S. at 166, 175.

II. THE ISSUES PRESENTED RECUR IN STATE-COURT CLASS ACTION LITIGATION AND REQUIRE IMMEDIATE RESOLUTION

This Court's immediate review of the trial court's class certification and notice orders is necessary and appropriate because the constitutional infirmities in those orders are common in state court class actions and because the failure to review those orders now may preclude effective review later.

A. The Abuse Of The Class Action Device In The State Courts Is Reaching Epidemic Proportions.

The constitutional violations involved in this case are part of a disturbing pattern in contemporary class action litigation. The federal courts have repeatedly concluded that nationwide class actions raising state common law claims could not be certified consistent with the requirements of Fed. R. Civ. P. 23, due process, and federalism. See, *e.g.*, *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *In re Am. Medical Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). The federal courts also have taken seriously this Court's holdings in *Eisen* and *Mullane*, insisting that those who purport to represent a class assume the responsibility and expense of providing actual written notice to class members whose names and addresses are identifiable. See, *e.g.*, *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1007-1008 (D.C. Cir. 1986); *Bremiller v. Cleveland Psychiatric Inst.*, 898 F. Supp. 572, 581 (N.D. Ohio 1995).

Seeking a more hospitable forum, class action lawyers have shifted their attention to state court. As one neutral researcher has reported, the "doubling or tripling over the past several years of the number of putative class actions" faced by American companies has been "concentrated in the state courts." Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation*

15 (1997).[14] See also Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 575 (1996) (certification of nationwide classes by state courts "has been increasing in recent years"). Indeed, the lead appellate lawyer for the putative class in this case candidly acknowledges that "[i]t is no secret that class actions — formerly the province of federal diversity jurisdiction — are being brought increasingly in the state courts." Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 Loy. L.A. L. Rev. 373, 386 (1998).

Nor are class action attorneys using just any state court in their effort to circumvent the constitutional limitations on class actions; with increasing frequency they are filing their cases in state courts that have acquired a reputation for acquiescing in requests for nationwide certification and running roughshod over the constitutional rights of defendants and absent class members. For example, in 1995-1997 courts in six thinly populated rural Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes, primarily against large national companies. Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary (Mar. 5, 1998), available at 1998 WL 122544).[15]

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[14] Anecdotal evidence supports the conclusion that the absolute number of state-law class actions has been skyrocketing. For example, the Vice President-General Counsel of Ford Motor Company testified before Congress that the number of class action lawsuits pending against Ford has escalated from 8 in 1990 to 50 at the end of 1995 to over 100 by the end of 1997. Statement of John W. Martin, Jr. before the Courts and Intellectual Property Subcommittee of the House Committee on the Judiciary (Mar. 5, 1998), available at 1998 WL 122533.

[15] More anecdotally, the Wall Street Journal has reported:

> Plaintiffs' lawyers are going out of their way to sue big companies these days. All the way to backwaters like Plaquemine, La., Union City, Tenn., and Eutaw, Ala. A growing number of big lawsuits are landing in small towns. * * *
>
> The trend is an outgrowth of federal courts' growing aversion to

These hand-picked state courts have demonstrated a propensity to certify classes that federal courts have refused to certify and to casually dispense with the procedural safeguards required by the Constitution and faithfully applied in the federal courts. For example, in 1996 a judge in Mobile County, Alabama, certified a nationwide class action alleging state law products liability, breach of warranty, negligence, and fraud claims on behalf of several million owners of homes on which the defendants' siding had been installed. In an opinion written by class counsel, the court brushed aside the constitutional choice-of-law problem, stating, without the slightest legal analysis, that "the Court is not persuaded that the variations in applicable state laws are so significant as to create predominant individual issues." Order Certifying Plaintiff Class at 8, *Naef v. Masonite Corp.*, No. CV-94-4033 (Mobile Cty. Cir. Ct. Nov. 15, 1995) (reprinted in *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1090 (Ala. 1996)). The court also gave short shrift to the contention that the claims were fact-specific and that the defendants were being denied the opportunity to prove defenses specific to the individual class members. *Ibid.* And, as in this case, the court refused to provide actual notice to the class, accepting class counsel's representation that publication notice was good enough. See 681 So. 2d at 1075 (declining to overturn trial court's acquiescence in class counsel's plan to provide notice only by publication). After the Alabama Supreme Court denied mandamus, the trial court held a "first-phase" trial limited to the issue of whether the defendants' products were defective. In that trial, the court purported to solve the dilemma of having to apply the laws of the

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> massive litigation: Over the past year, federal judges dismissed giant cases against tobacco companies and asbestos manufacturers, and imposed new limits making it more difficult to file class-action suits in federal court. * * * So plaintiffs' lawyers are taking their act on the road.
>
> Rural courts offer lawyers a strategic advantage. In major metropolitan areas, judges are assigned to cases by lottery, but small communities often have only one or two judges in town. * * * Unlike federal judges, many state judges are popularly elected, raising the possibility of bias.

Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, Wall St. J., Oct. 10, 1996, at B1.

51 jurisdictions by simply making up its own law, amalgamating bits and pieces of the laws of the 51 jurisdictions into five different design defect standards that did not accurately represent the law of *any* State.[16]

Meanwhile, another set of class action lawyers sought certification of an identical class in federal court. That court denied certification, holding that "[d]ifferences in state law and user facts overwhelm the common elements of plaintiffs' claims. Combined, these differences are so great as to make national class treatment unwieldy, unfair, and unlawful." *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997). The court further explained that the experience with the first phase of the Alabama case "supplies ample evidence of legal and factual variation, and thus counsels against manageability and superiority." *Id.* at 426 n.19. It deemed inadequate the Alabama court's attempt to boil down the laws of 51 jurisdictions into five sets of "Esperanto instruction[s]," opining that "[t]he number of state products liability laws that confront Masonite and their doctrinal dissonance cannot be glossed over casually." *Id.* at 422. The court concluded that "Due Process, the Seventh Amendment, * * * and Rule 23 make it impossible to accommodate the theoretical benefits of class treatment." *Id.* at 427.

Similarly, in 1996 a federal district court in Alabama refused to certify a class action alleging that a subsidiary of General Motors fraudulently failed to disclose that it purchases installment contracts at a lower interest rate than the one charged to the car purchaser by the dealer. *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671 (M.D. Ala. 1996). Reasoning that the jury would have to examine the circumstances of each transaction to resolve such issues as duty to disclose and reliance, the court dubbed the case "the antithesis of a class action." *Id.* at 677-678. Yet an Alabama trial court certified a class action raising the identical claims against

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[16] For a fuller description of the constitutionally flawed procedures imposed in *Masonite*, see Application for a Stay of Proceedings Pending the Filing of a Petition for a Writ of Certiorari to Review a Final Decision of the Supreme Court of Alabama, *International Paper Co. v. Naef*, No. A-28 (filed July 3, 1997). During the pendency of the stay application, the parties settled the case and the defendants withdrew the application.

a Ford subsidiary, and the Alabama Supreme Court refused to intervene. See *Ex parte Ford Motor Credit Co.*, 697 So. 2d 464 (Ala. 1997) (Hooper, C.J., dissenting).

The present case is but the latest example of this regrettable phenomenon. As described above, several courts (both state and federal) have refused to certify even *statewide* classes raising the precise claims that have been certified for class action treatment in this case. See page 18, *supra*. The only distinction between this case and the other non-OEM cases is that class counsel appear to have been more careful in selecting their forum — a distinction that manifestly should make no difference.

B. The Coercive Effect Of Class Certifications And The Fairness Concerns Underlying The Notice Requirement Make Immediate Review Necessary And Appropriate.

1. It is critical that the Court act now to review the class certification order rather than wait until after a trial on the merits. That order hangs like a Damoclean sword over State Farm, threatening to force it into an unwarranted settlement and coerced relinquishment of its right to trial. As the Seventh Circuit has explained, companies that face a large certified class and hence enormous potential damages are "under intense pressure to settle." *Rhone-Poulenc*, 51 F.3d at 1298 (Posner, C.J.). If, not wanting to "roll these dice," they settle, "the class certification — the ruling that will have forced them to settle — will never be reviewed." *Ibid*. These are "blackmail settlements." Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973); see also *Castano*, 84 F.3d at 746 (pressure emanating from certifications of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

The *Masonite* class action is illustrative. The defendants in that case twice sought mandamus from the Alabama Supreme Court to prevent the plaintiffs and the trial court from vitiating their due process rights by imposing a trial plan that precluded them from raising individualized defenses and proving that the siding supplied to particular class members was not in fact defective. When the Alabama Supreme Court denied their second request for relief,

defendants, finding themselves in the paradigmatic class action dilemma, chose to settle the case for between $150 million and $600 million rather than risk bankrupting liability at the hands of a Mobile County jury. See Matthew Ebnet, *Siding Case Aids Homeowners: Company Will Pay Repair Bills for Masonite Flaws*, Kansas City Star, Aug. 3, 1997, at A1.

The amount of damages claimed by class counsel in this case is similarly extraordinary and, as in *Masonite*, creates an enormous pressure to pay the protection money demanded by class counsel and to forgo not just the right to challenge the propriety of the class certification but also the right to defend on the merits. If State Farm were to succumb to this pressure, the effect would be to coerce abandonment of the use of non-OEM parts *nationwide* — not only by State Farm, but, because of the *in terrorem* effect of such an outcome, by all auto insurers — without any appellate court having ever addressed on the merits the propriety of the devices employed to grease the skids of this class action.

This Court has recognized the importance of interlocutory review of class certifications by submitting to Congress a proposed amendment to Fed. R. Civ. P. 23 that would give the federal courts of appeals discretion to hear appeals from the grant or denial of class certifications without applying either the requirements of 28 U.S.C. § 1292(b) or the exacting standards for a writ of mandamus. The Committee Note accompanying the proposed new rule specifically recognizes that a discretionary power of interlocutory review of class certifications is desirable because "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Similarly, the Report of the Judicial Conference's Committee on Rules of Practice and Procedure recommending approval of the new rule opines that "the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice" because "[a] certification decision is often decisive as a practical matter": while the denial of certification can put an end to an action seeking to vindicate large numbers of small claims, "certification can exert enormous pressure to settle."

This wise change to the federal rules currently has no counterpart in most States, including Alabama, Illinois, and other magnets for class action litigation. Generally, defendants may obtain review of class certifications in state court only by attempting to meet the stringent standards for mandamus. As the experience of State Farm, Masonite, Ford Motor Credit, and others has shown, that is often an insurmountable hurdle. It is for that reason critical that this Court exercise its discretionary authority to grant certiorari on an interlocutory basis when, as in this case, the constitutional violations are manifest and recurring.

2. The need for immediate review of the trial court's order permitting publication-only notice is even more compelling. If State Farm were forced to litigate this case as a nationwide class action, it should, at the very least, not be subjected to the risk that any victory it achieves will be effectively vitiated because the notice was constitutionally insufficient to bind absent class members. As this Court has explained, Rule 23's requirement that class members receive the best practical notice (which has its genesis in due process (see page 21, *supra*)) and then make a binding determination about whether to remain in the class was a response to "[a] recurrent source of abuse under the former Rule" — namely, "the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. * * * This situation — the potential for so-called 'one-way intervention' — aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). The purpose of requiring notice and an opt-out decision before trial — which is rooted in fundamental fairness — would be utterly frustrated by allowing the notice issue in this case to await resolution until after a final judgment on the class claims.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment below or, in the alternative, order plenary briefing and argument.

Respectfully submitted.

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JUNE 1998

APPENDIX

APPENDIX A

SUPREME COURT OF ILLINOIS

March 24, 1998

No. 85008

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

HON. JOHN SPERONI, ASSOCIATE JUDGE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, ET AL., ETC.,

Respondents.

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

State Farm Mutual Automobile Insurance Company, petitioner, v. Hon. John Speroni, Associate Judge of the Circuit Court of the First Judicial Circuit, et al., etc., respondents.

Motion by petitioner for leave to file a petition for an original writ of mandamus and/or writ of prohibition or for a supervisory order. Motion *denied*. Bilandic, J., took no part.

APPENDIX B

IN THE CIRCUIT COURT FOR THE
FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

No. 97-L-114

TAMMY SNIDER AND MICHAEL AVERY,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER AND FINDINGS THAT ACTION MAY BE MAINTAINED AS A CLASS ACTION FOR BREACH OF CONTRACT, CONSUMER FRAUD AND EQUITABLE RELIEF CLAIMS

I. SUMMARY OF THE CASE

The representative plaintiffs ("Plaintiffs") in this class action allege that defendant State Farm Mutual Automobile Insurance Company ("State Farm") has breached its contract with its auto insurance policyholders, and violated the provisions of Illinois' Consumer Fraud and Deceptive Business Practices Act (the "CFA"), 815 ILCS 505/1 *et seq.* Plaintiffs seek certification of a class (the "Class") composed of:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had imitation that is, non-factory-authorized and/or non-OEM parts installed on their vehicles or else received

monetary compensation determined in relation to the cost of imitation parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided in Illinois and whose policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.

Plaintiffs' claims concern contractual language in standard form State Farm automobile insurance policies issued nationwide. This language either obligates State Farm to restore a policyholder's vehicle to "its pre-loss condition" after an accident, or for State Farm to "pay to repair or replace the property or part with like kind and quality." While State Farm has designed form policies specific to each state, the contractual obligations at issue in this case are stated in substantially identical form in State Farm policies issued nationwide.

Notwithstanding this language, State Farm's uniform policy specifies the use of certain non-original equipment manufacture (non-OEM) replacement parts (referred to as "quality replacement parts" by State Farm and "imitation parts" by Plaintiffs) when these parts are priced lower than original equipment manufacturer's (OEM) parts. Whether this policy violates the above-referenced provisions of State Farm's insurance contracts with its policyholders is the central issue of this litigation.[1]

In their Second Amended Class Action Complaint (A) (the "Complaint"), their submissions, and their arguments before the Court, Plaintiffs contend that non-OEM parts are neither of "like kind and quality," nor are they sufficient to restore a policyholder's vehicle to its "pre-loss condition." For this reason, Plaintiffs

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[1] Throughout the hearing there was much discussion as to what parts may or may not be "crash parts." Throughout this order the Court has used the term "non-OEM parts" without specifying "crash parts" so as to mirror the Class definition.

contend that State Farm has breached its contract with its policyholders. Plaintiffs seek damages for breach of contract and for State Farm's alleged violation of CFA. Plaintiffs also seek equitable relief against State Farm as set forth in Plaintiffs' Complaint.

State Farm contends that non-OEM parts (particularly those certified by the Certified Auto Parts Association ("CAPA")) are of "like kind and quality" to OEM parts, and that they fully restore a policyholder's vehicle to its "pre-loss condition." State Farm also contends that its policyholders are informed whenever non-OEM parts are used, and that its use of the term "quality replacement parts" is not misleading.

II. GOVERNING LEGAL STANDARD

Certification of a class action in the State of Illinois is governed by 735 ILCS 5/2-801, which provides as follows:

> An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:
>
> (1) The class is so numerous that joinder of all members is impracticable.
>
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interests of the class.
>
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

Plaintiffs request class certification under 5/2-801. The Court has carefully considered the testimony adduced over the course of the evidentiary hearing on class certification completed in November, 1997, the affidavits filed by Plaintiffs and State Farm, the pleadings and briefs submitted to the Court, the voluminous exhibits introduced at the certification hearing, and the arguments by counsel. *See Gordon v. Boden*, 224 Ill. App. 3d 195, 199, 586

N.E.2d 461, 464 (1991). In considering class certification the Court has assigned to Plaintiffs the burden of satisfying the four requirements of 5/2-801. *Wheatley v. Board of Ed. of District 205*, 99 Ill. 2d 481, 486, 459 N.E.2d 1364, 1367 (1984). The Court has not considered the possibility of success on the underlying merits, but only whether the statutory requisites for class certification are satisfied at this time. *See Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1075, 530 N.E. 2d 994, 998 (1988) ("hypothetical problems that may arise in the future***[are] not a sufficient basis to refuse to certify an otherwise properly pleaded class action.") Applying this standard, the Court makes the following findings of fact, and the following conclusions, with respect to each of the four statutory requirements for certification of a class action in Illinois.

III. CERTIFICATION ISSUES

A. Numerosity and Impracticality of Joinder

735 ILCS 5/2-801(1) requires not only that the number of plaintiffs be numerous, but also that joinder of plaintiffs in one individual action be impractical. "In general the question of numerosity depends on the particular facts of each case and no arbitrary rules regarding the size of class have been established by the courts." *In re Application of Edward J. Rosewell,* 236 Ill. App. 3d 165, 174, 603 N.E. 2d 681, 686 (1992). Where there are a number of potential claimants, and the individual amount of each claim is small, making redress on an individual level difficult, if not impossible, Illinois courts have been particularly receptive to proceeding on a class action basis. *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E. 2d 478 (1981), *cert. dismissed*, 459 U.S. 86 (1982).

Testimony at the certification hearing indicates that State Farm's practice of using non-OEM parts affects a large number of policyholders. State Farm is the largest auto insurer in the United States, with over 34 million auto policies in effect nationwide. Affidavit of Kathleen M. Pechan, Defendant's Exhibit 8, p. 3. State Farm paid approximately 5.1 million separate collision and comprehensive claims in 1996. Affidavit of David W. Gibson Jr., Defendant's Exhibit 5, p. 3. In 1993, 49.4% of State Farm's repair estimates nationwide included CAPA certified non-OEM

parts. Plaintiffs' Exhibit 177. It is clear from the exhibits introduced by both Plaintiffs and State Farm that millions of people are affected by State Farm's current claims settlement practices. The Court therefore finds the potential class members are sufficiently numerous.

In reaching its determination that joinder is impracticable the Court is guided by the number of potential class members. The Court finds that, first, the potential class members are widely distributed. Second, the class is large and its members cannot be easily identified, located and informed of the pendency of this action for purposes of formal joinder. Third, the potential class members are average consumers, not "sophisticated" entities. Fourth, the individual damages alleged in this action are, for the most part, small. They involve accelerated vehicle deterioration after repair, inferior fit and finish of repaired areas, and loss of value at resale. The dollar value of individual claims, although not nominal, is not large. *See, e.g.*, Plaintiffs' Exhibit 94 ($1,670 diminution in value upon resale when non-OEM parts used). Finally, it should be noted that this is the type of consumer class action on behalf of smaller claimants to which Illinois courts have been particularly receptive. *Gordon*, 224 Ill. App. 3d at 204, 586 N.E.2d at 467.

The Court finds that more localized litigation, either on an individual or localized class basis, would be a waste of scarce judicial resources both in this and other states. Addressing the common issues in one litigation would aid judicial administration. Therefore, the Court finds that requirements for certification of a class action under 5/2-801(1) are satisfied.

B. Common Questions of Fact or Law

735 ILCS 5/2-801(2) requires that there be "questions of fact or law common to the class." However, "[c]ertification require[s] only that there be either a predominating common issue of law or fact, not both." *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 67, 81, 510 N.E. 2d, 840, 846 (1987). While Plaintiffs must demonstrate that the common questions predominate over individual issues,

> "the hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action. Where it appears that the common issues is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action."

Harrison Sheet Steel Co. v. Lyons, 15 Ill. 2d 532, 538, 155 N.E. 2d 595, 598 (1959). Common questions arising from the interpretation of standard contract provisions or other uniform documents may be found to predominate; accordingly, the inability of some members of the class to obtain relief due to particular factors unique to them, is to be resolved at trial and does not impair certification of the class. *Steinberg*, 69 Ill. 2d at 338, 371 N.E. 2d at 643; *Rosen v. Village of Downer's Grove*, 19 Ill. 2d 448, 456, 167 N.E. 2d 230, 235 (1960).

Testimony at the class certification hearing highlighted the common factual pattern in this case. James Ford, employed by State Farm as a divisional claims superintendent, testified that State Farm's claims policies are communicated through a series of "general claims memos" issued from State Farm's headquarters in Bloomington, Illinois, which governs claims policy nationwide. Certification Hearing at 0120-0124. General Claims Memo #430, introduced at the hearing as Defendant's Exhibit 23, governs the use on non-OEM parts.

In resolving customer claims, an estimate is prepared at a local State Farm claims office. When a particular part is needed to complete a repair, the part number is input into a computer program. This program contains a database maintained by, respectively, Mitchell, C.C.C. or A.D.P., *Id.* at 0142, which contains information on the availability of, and price for, various parts from suppliers State Farm has approved. *Id.* at 0144. The computer's software then automatically searches what was referred to as "the matrix," and locates the cheapest available part. *Id.* at 0143-44. This part, whether it is an OEM or non-OEM part, is then automatically specified on the repair estimate. *Id.* at 0143-44. The State Farm adjuster has no authority to override the computer's choice of the cheapest part. *Id.* at 0153-54. It appears that this

practice is uniform throughout the United States wherever non-OEM parts are used. *Id.* at 0155. Defendant's Exhibit 23. The policyholder is neither informed, nor consulted when a non-OEM part is specified. Certification Hearing at 0132. If the policy holder does not want non-OEM parts placed on their car, they must convince a body shop to absorb the price difference, or pay for the difference in price themselves. *Id.* at 0151.

As to the consumer fraud allegations, the facts presented at the certification hearing on State Farm's methods of disclosing to policyholders its use of non-OEM parts also demonstrates a course of conduct common to all class members. When such parts are used on an estimate, the policyholder is given a State Farm brochure discussing the use of non-OEM parts. Defendant's Exhibit 24; Certification Hearing at 0124-25. The estimate is then stamped indicating the use of non-OEM parts. Defendant's Exhibit 27. State Farm has also promoted the use of the term "quality replacement parts" nationwide in an effort to promote its substitution of non-OEM for OEM parts. Plaintiffs' Exhibits 115, 116.

The Court finds that the evidence introduced at the certification hearing demonstrate "a series of essentially identical transactions," *Miner*, 87 Ill. 2d at 19, 428 N.E. 2d at 484, between State Farm and its insureds, which transactions routinely result in the use of non-OEM parts.

In reaching its conclusions that the class claims are essentially factually identical, the Court acknowledges the significant evidence presented at the hearing regarding the varying availability and use of non-OEM parts in each of State Farm's regional offices. Affidavit of David A. Gibson, Jr., Defendant's Exhibit 5; Certification Hearing at 0121, 0124. The Court notes that varying availability of non-OEM parts affects how many policyholders did or did not receive non-OEM parts, but it does not affect the common pattern with respect to class members, who always received such parts if they were available. Any person whose car was repaired only with OEM parts is not part of the class for which certification is sought. Therefore, any variations in OEM part use is irrelevant to certification.

Given State Farm's common and ongoing course of conduct in repairing its insureds' vehicles with cheaper non-OEM parts whenever these parts were available, potential class members have a common interest in determining State Farm's obligations under its contractual provisions. "A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner as to an entire class. In such circumstances, the common class questions still dominate the case." *Brooks v. Midas-International Corp.*, 47 Ill. App. 3d 266, 273, 361 N.E. 2d 815, 820 (1977). Here the class members have a common interest in determining if State Farm's policy violates its contractual obligations, and this issue of contractual interpretation predominates over other issues. *See, e.g., Carrao v. Healthcare Service Corp.*, 118 Ill. App. 3d 417, 428, 454 N.E. 2d 781, 790 (1983). Similarly, the question of whether State Farm's practice of using non-OEM parts constitutes a violation of the CFA is a common issue appropriate for resolution. *See, e.g., Brooks*, 47 Ill. App. 3d at 272, 361 N.E. 2d at 820.

In determining if this common question predominates, the Court has carefully considered State Farm's contention that it has no standard form auto insurance policy, as each individual state's policy is tailored to comply with the requirements of that state. *See* Affidavit of Everett J. Truttmann, Defendant's Exhibit 9. Therefore, State Farm contends there is no common question to be interpreted. The Court finds, however, that the policies specific form is immaterial, provided that the operative contractual language contained in each policy is susceptible to uniform interpretation. Whether particular language in its policies authorizes State Farm's use of non-OEM parts or is in conflict with the "like kind and quality" or "pre-loss condition" language of the policies is not a question to be resolved during class certification. It is a question for resolution on the merits.

State Farm has placed particular emphasis on its practice of using CAPA-certified non-OEM parts. Under this practice, State Farm will specify only a CAPA-certified part in place of an OEM part when that type of part was subject to CAPA certification. Affidavit of David A. Gibson, Jr., Defendant's Exhibit 5, p. 8. Although considerable testimony was received as to the difference

between CAPA-certified non-OEM parts, non-CAPA-certified non-OEM parts, and OEM parts, this testimony all addresses the merits of whether non-OEM parts satisfy State Farm's contractual obligations. This ultimate issue is irrelevant to class certification, where the common treatment of the class members in having received non-OEM parts is the central question.

The Court heard substantial testimony as to the number of different non-OEM parts. Since the Court finds that a common question concerning the use of non-OEM parts has been established, the number of different parts and their relative quality is a question that goes to the merits of whether non-OEM parts are equal to OEM parts. Plaintiffs submissions that non-OEM parts are categorically inferior in performance and safety, because of inferior design, manufacture and quality control, and evidence that they are commonly perceived by the marketplace as inferior, with a resulting negative effect on policyholders' cars' ultimate resale value are factors in the Court's determination that the requirements of 2-801(2) have been established.

In *Phillips Petroleum Co. v. Shutts*, the United States Supreme Court discussed the constitutional limitations on the application of a particular state's substantive law to the claims of out-of-state plaintiffs, finding that a state may apply its substantive law beyond its borders where it has "'significant contact or significant aggregation of contracts' to the claims asserted by each member of the plaintiff class, contacts 'creating, state interests'*** insur[ing] that the choice of [law] is not arbitrary or unfair." 472 U.S. 797, 821-22, 105 S. Ct. 2965, 2979 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-12, 101 S. Ct. 633, 640 (1981). Illinois courts have approved the application of the CFA, § 815 ILCA 505/1 *et seq.*, to the claims of out-of-state plaintiffs. *See, e.g., Gordon*, 224 Ill. App. 3d at 202-03, 586 N.E. 2d at 466; *Martin* 117 Ill. 2d 67, 510 N.E.2d 840. In *Martin*, a class composed of in state and out-of state plaintiffs sued an Illinois corporation for fraud and for violations of the Illinois CFA. Relying upon *Phillips*, the Illinois Supreme Court noted that defendant's principal place of business was Illinois and stated:

> "Applying the Phillips Petroleum standard to the instant case, it is apparent that Illinois substantive law can be applied to resolve the underlying common factual dispute. Here each member of the plaintiff class asserts the same breach of defendant's fiduciary duty with regard to the same nondisclosure of the same fact. This common allegation implicates the legitimate interests of the State of Illinois in insuring that persons and entities within its jurisdiction, insofar as they undertake to act as agents, do so in accordance with its law." 117 Ill. 2d at 82, 510 N.E.2d at 847.

The Illinois Supreme Court concluded that "there can be no doubt that the claim of each member of the plaintiff class implicates the legitimate interests of Illinois in applying its law to adjudicate a dispute involving a business principally situated in its jurisdiction and which, by its own efforts, insistently has sought to avail itself of both the courts and the laws of the forum State." 117 Ill. 2d at 83, 510 N.E.2d at 847. Under *Phillips* and *Martin*, given the fact that State Farm is situated and headquartered in Illinois and affirmatively uses Illinois courts and law, this Court could apply Illinois substantive laws, including the CFA to the entire class.

While it is not necessary for the Court at this time to decide upon choice of law as to the breach of contract claim, it does note that the eventual decision as to choice of law will not prevent the certification of the Class in this case. *Gordon*, 224 Ill. App. 3d at 202, 586 N.E.2d at 466. The Court retains the right to divide the litigation into a manageable number of sub-classes under 2-802(b) should differences in law present themselves. The Court finds that the requirements of Section 2-801(2) are met as "common issues of fact or law predominate."

C. <u>The Representative Plaintiffs Fairly and Adequately Protect the Interest of the Class</u>

735 ILCS 5/2-801(3) conditions class certification upon a finding that "[t]he representative parties will fairly and adequately protect the interest of the class." "The purpose ... of the adequate representation requirement is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Gordon*, 224 Ill.

App. at 203, 586 N.E. 2d at 466. Judicial evaluation of the quality of the representation, as well as class certification in general, rests within the sound discretion of the trial court. *McCabe v. Burgess*, 75 Ill. 2d 457, 464, 389 N.E. 2d 565, 568 (1979).

Adequate representation assures compliance with due process requirements. "The test applied to determine the adequacy of representation is whether the interests of those who are parties are the same as those who are not joined and whether the litigating parties fairly represent those not joined." *Miner*, 87 Ill. 2d at 14, 428 N.E.2d at 482. Essentially, the determination focuses on whether the absentee members are so represented by the persons before the court "that their interests will receive actual and efficient protection." *Brooks*, 47 Ill. App. 3d at 274, 361 N.E. 2d at 820, quoting *State Life Insurance Co. v. Board of Education*, 394 Ill. 301, 308, 68 N.E.2d 525, 529 (1946). Finally, unlike Federal Rule Of Civil Procedure 23, there is no "typicality" requirement in 5/2-801(3). The Illinois rule is more liberal than the federal rule in this regard and "...a class representative may not be disqualified merely because his claim is not exactly the same as the claims of other potential class members." *Carrao*, 118 Ill. App. 3d at 428, 454 N.E.2d at 790. The Court finds that the requirement of adequate representation under 735 ILCS 5/2-801(3) has been satisfied.

After a rigorous analysis of Plaintiffs' Complaint, Plaintiffs' affidavits and Plaintiffs' counsels' affidavits or resumes, the Court concludes that Plaintiffs have zealously pursued their claims since learning of State Farm's alleged wrongful conduct and that Plaintiffs have sufficient financial resources to absorb the expenses involved in being the named representatives. The Court further finds that no conflicting interests exist between Plaintiffs and the Plaintiff Class as it is clear from the Court's review of the material submitted in support of class certification that the representatives herein and Class members share common objectives and legal and factual positions. Other than the dates and specific amounts concerning Plaintiffs' repairs and Class members' repairs, the proof, objectives, legal and factual positions will be essentially identical from plaintiff to plaintiff and class member to class member.

In determining the adequacy of representation, the Court may also consider the quality and experience of the attorneys for the Class. The Court finds, after a rigorous analysis and review of the pleadings and resumés submitted by Plaintiffs' counsel and having observed their conduct in open Court, that they are able advocates for the Class. Counsel for Plaintiffs have regularly engaged in major complex consumer litigation of size, scope and complexity similar to this case. Counsel have successfully prosecuted many and varied class actions or other complex litigation. They have the experience and sophistication that the Plaintiffs and Class members lack. The Court finds that counsel for Plaintiffs are well suited for this case and that Plaintiffs will fairly and adequately protect the interest of the Class in compliance with the mandate of 735 ILCS 5/2-801(3).

D. <u>The Class Action is an Appropriate Method to Resolve the Class Issues</u>

735 ILCS 5/2-801(4) conditions class certification on a finding that "[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy." In applying the fourth prerequisite, the Court has considered whether a class action can best secure economies of time, effort, and expense and promote uniformity of decision or accomplish other ends of equity and justice. *Gordon*, 224 Ill. App. 3d at 203, 586 N.E.2d at 467. While Federal Rule Of Civil Procedure 23(b)(3) requires that a class action be *superior* to the available methods of adjudication, the Illinois statute requires that the trial court find that the class action is an *appropriate* method of litigating the controversy. Section 5/2-801(4). This standard allows the trial court a more flexible measure of discretion in determining whether to permit the class action to proceed. A significant factor in the case at bar is that a class action is the only practical means for State Farm policyholders to present their claims and for State Farm to achieve finality as to their claims.

Illinois courts have historically recognized that class actions are an appropriate method of fairly and efficiently adjudicating controversies involving numerous small claims. In *Wood River Area Development Corporation v. Germania Federal Savings and*

Loan, 198 Ill. App. 3d 445, 452; 555 N.E.2d 1150, 1154 (1990), the Court stated "[t]he class action is particularly appropriate where those who have allegedly been insured 'are in poor position to seek legal redress, either because they do not know enough or because such redress in disproportionately expensive.' ...Its 'historic mission' has been to take care of the smaller guy." The *Wood River* court concluded,

> "No matter how refined, how revised, or how evolved" [the class action becomes], "...the goal of the class action remains the same — justice for the lowly, the tenants, the parishioners, the multitudes." 198 Ill. App. 3d at 448, 555 N.E.2d at 1152.

The United States Supreme Court recently acknowledged not only the appropriateness, but the necessity, of class treatment of small consumer claims in *AmChem Prods. Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 2250 (1997), stating,

> "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."

With respect to "small claims" class actions in general, the Court stated:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." 117 S.Ct. at 2246, quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

The evidence presented to the Court supports the conclusion that, not only is a class action an appropriate method for the fair adjudication of the disputes between Defendant State Farm and its millions of automobile insurance policyholders, but also that it may be the only means by which these disputes may be efficiently resolved.

Defendant State Farm provides automobile insurance coverage to one out of every five insured drivers in the United States, making it the nation's number one auto insurer. Plaintiffs' Exhibit 102. The evidence submitted by Plaintiffs indicates that State Farm achieved a savings of $32 million in 1994 from the use of non-OEM parts. Plaintiffs' Exhibit 92. Accordingly, this action qualifies for class resolution both in terms of the dollar amount in controversy and the number of claims involved.

State Farm has previously settled two lawsuits challenging its non-OEM parts practices — the Illinois case entitled *Krusinski v. State Farm*, No. 87 CH 10253, in the Circuit Court of Cook County ("Krusinski"), and the California case entitled *Krinsk v. State Farm Mutual Automobile Insurance Company*, No. 626412, in San Diego County Superior Court ("*Krinsk*"). Defendant's Exhibit 1. State Farm has settled both the *Krusinski* and *Krinsk* actions but has continued its practice of utilizing non-OEM parts in its repairs of policyholders' vehicles. In addition to other relief, Plaintiffs at bar seek an injunction prohibiting State Farm from continuing its practice of settling policyholders' repair claims based upon the use and cost of non-OEM parts.

Proof of Plaintiffs' claims against Defendant State Farm may be made on a class-wide basis. After a rigorous review of the pleadings, exhibits and affidavits submitted by Plaintiffs, the only proof that might differ from Plaintiff to Plaintiff and class member to class member would appear to be the amount of damages suffered by each class member. It is well settled, in Illinois and elsewhere, that differences in the amounts of damages suffered by individual class members will not defeat class certification. *Gordon*, 224 Ill. App. 3d at 202, 586 N.E.2d at 465-66. Individual lawsuits for small amounts would be too expensive, and absent a class action, individual lawsuits run a substantial likelihood of inconsistent adjudications. Upon consideration for the pleadings, exhibits and affidavits submitted by Plaintiffs, the Court concludes that the proposed Class is manageable. The Court concludes, pursuant to 735 ILCS 5/2-801(4), that a class action is an appropriate method for the fair and efficient adjudication of this controversy.

IV. CONCLUSION

Pursuant to 735 ILCS 5/2-801, this Court concludes that Plaintiffs have adequately satisfied the four requirements for class certification of this action under Illinois law. Plaintiffs will now have the opportunity to try and prove the merits of their claims, which is an entirely different matter from establishing the requirements for class certification. The Court notes that class certification will allow all State Farm policyholders to seek redress for their claims and will also provide State Farm with finality as to the claims. State Farm has, for years, had class actions filed against it concerning the matters involved in this litigation and has been forced to defend itself in numerous jurisdictions. Since this case has ben filed, the parties have made the Court aware of several cases which have recently been filed, including the *Dorries* action in Champaign County, Illinois (No. 97-L-188), which has not been terminated by Judge Green's November 10, 1997 order in "*Krusinski*". The Court has learned that the attorneys prosecuting the *Dorries* case in Illinois had also filed an identical class action case in Alabama. Such a multiplicity of suits is an inefficient use of judicial resources and places State Farm in the unenviable position of trying to defend itself on multiple fronts.

The Court believes that Illinois is the one State where a national class can be maintained and where all issues between State Farm and State Farm's policyholders concerning the use of non-OEM parts can finally be resolved. The Court is unaware of any other class action cases pending in Illinois concerning the issues involved in this litigation and is unaware of any other class action case in any other State which has certified a national class after a full evidentiary hearing on class certification.

The following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had imitation that is, non-factory-authorized and/or non-OEM parts installed on their vehicles or else received

monetary compensation determined in relation to the cost of imitation parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided in Illinois and whose policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.

ENTERED: December 5, 1997

John Speroni
Associate Circuit Judge

APPENDIX C

IN THE CIRCUIT COURT FOR THE
FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

No. 97-L-114

TAMMY SNIDER AND MICHAEL AVERY,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

AMENDMENT TO ORDER AND FINDINGS THAT ACTION MAY BE MAINTAINED AS A CLASS ACTION FOR BREACH OF CONTRACT, CONSUMER FRAUD AND EQUITABLE RELIEF CLAIMS

On December 5, 1997, this court entered an Order And Findings That Action May Be Maintained As A Class Action For Breach Of Contract, Consumer Fraud And Equitable Relief Claims. It is clear to the court that this case is about "crash parts", not all parts of a vehicle. The court, after considering the arguments of counsel (made December 29, 1997) and written submissions of counsel (filed February 5, 1998 and February 6, 1998), finds that the Plaintiff Class certified by the court in its December 5, 1997 Order should be modified and revised in certain respects, including, without limitation, in regard to the term "crash parts" and the term "OEM" which means "Original Equipment Manufacturer".

WHEREFORE IT IS ORDERED THAT the last paragraph of the court's Order And Findings That Action May Be Maintained As A Class Action For Breach Of Contract, Consumer Fraud And Equitable Relief Claims (entered December 5, 1997), which provides:

"The following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had imitation that is, non-factory-authorized and/or non-OEM parts installed on their vehicles or else received monetary compensation determined in relation to the cost of imitation parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.
>
> In addition, the following persons are excluded from the class: (1) persons who resided in Illinois and whose policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996."

be and the same is hereby amended to provide:

"The following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were issued by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory-authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts" installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.

"Crash parts" are vehicle components typically repaired or replaced as a result of crash damage rather than as a result of normal vehicle usage. The non-factory-authorized and/or non-OEM crash parts involved in this Plaintiff Class are of the following types: 1) fenders, 2) hoods, 3) doors, 4) deck lids, 5) luggage lid panels, 6) quarter panels, 7) rear outer panels, 8) front end panels, 9) header panels, 10) filler panels, 11) door shells, 12) pickup truck beds, box sides, and tail gates, 13) radiator/grill support panels, 14) grilles, 15) head lamp mounting panels/brackets/housings/lenses/doors, 16) tail lamp mounting panels/brackets/housings /lenses, 17) outer body mouldings, 18) door body side moulding, 19) front wheel opening mouldings, 20) side mouldings, 21) front and rear fascias, 22) outer panel mounting brackets, supports and surrounds, 23) bumpers (excluding chrome bumpers), 24) bumper covers/face bars, and 25) bumper brackets/supports."

ENTERED: February 11, 1998

JOHN SPERONI
ASSOCIATE CIRCUIT JUDGE

APPENDIX D

IN THE CIRCUIT COURT FOR THE
FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

No. 97-L-114

TAMMY SNIDER, AND MICHAEL AVERY,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

ORDER SETTING EXCLUSION REQUEST DEADLINE, APPROVING FORM OF NOTICE OF CLASS CERTIFICATION, AND DIRECTING IMPLEMENTATION OF NOTICE PLAN

THIS CAUSE CAME ON for hearing on Plaintiffs' Motion for Order Approving Form of Notice and Directing Notice of Class Certification. The court, having considered the notice plans presented by both parties, the parties' arguments, memorandums, briefs, supporting affidavits and the record in this case, and being duly advised in the premises, FINDS as follows:

1. On February 11, 1998, this court entered an Amendment To Order (of December 5, 1997), confirming certification of a plaintiff class. The court has approved the definition of the class as follows:

> All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and

(2) made a claim for vehicle repairs pursuant to their policy and had non-factory-authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts"[1] installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates."

In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 25, 1996.

2. Pursuant to 735 ILCS 5/2-803, upon the determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.

3. The court has considered Plaintiffs' proposed Notice Plan, the objections thereto, and State Farm's Notice Plan which calls for direct mailed notice to persons on lists generated from either State Farm's computer estimating system or claims records, supplemented by limited published notice.

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[1] "Crash parts" are vehicle components typically repaired or replaced as a result of crash damage rather than as a result of normal vehicle usage. The non-factory-authorized and/or non-OEM crash parts involved in this Plaintiff Class are of the following types: 1) fenders, 2) hoods, 3) doors, 4) deck lids, 5) luggage lid panels, 6) quarter panels, 7) rear outer panels, 8) front end panels, 9) header panels, 10) filler panels, 11) door shells, 12) pickup truck beds, box sides, and tail gates, 13) radiator/grill support panels, 14) grilles, 15) head lamp mounting panels/brackets/housings/lenses/doors, 16) tail lamp mounting panels/brackets/housings/lenses, 17) outer body moldings, 18) door body side molding, 19) front wheel opening moldings, 20) side moldings, 21) front and rear fascias, 22) outer panel mounting brackets, supports and surrounds, 23) bumpers (excluding chrome bumpers), 24) bumper covers/face bars, and 25) bumper brackets/supports.

4. Plaintiffs' proposed Notice Plan includes three primary elements. First, the court-approved Class Action Notice would be placed in over 850 newspapers across the country, through insertion into the USA Weekend, Parade and Sunday supplements, as well as placement of the Class Action Notice in several of the most widely-read national publications, including *People*, the *National Enquirer/Star*, *Money*, *USA Today* and *U.S. News & World Report*. These publications were carefully selected by Plaintiffs' notice expert Todd Hilsee so as to mirror the class members and insure no demographic group among State Farm insureds receives inadequate notice.

5. Plaintiffs' proposed Notice Plan supplements this published notice through implementation of a press campaign to generate "earned media" coverage of the certification decision (which has already commenced), the issuance of notice, and the setting of a trial date. "Earned media" will involve distribution of notice and information on the ongoing litigation to 10,000 newspapers, 6,500 radio stations, and 1,000 television stations, including a special automotive wire.

6. Finally, Plaintiffs propose to provide notice on the Internet. This will be accomplished through an actively promoted Internet Web Site, which will be registered with internet search engines and promoted through Banner advertising. The court's orders and other notice materials will be able to be read and downloaded from this site. Individual class members will also be able to post their names and addresses for future communications.

7. Plaintiffs' proposed schedule of publications and notice efforts throughout the eight week notice period are carefully designed to reach all class members reasonably practicable. Plaintiffs comprehensive publication notice plan will cost upwards of $400,000 in direct costs.

8. The court has carefully considered the affidavits of Plaintiffs' notice expert Todd Hilsee as to the effectiveness of this plan. Mr. Hilsee is a qualified notice expert who has developed notice plans for many of the most significant recent federal and state class action cases. His curriculum vitae indicates that his

experience has included developing notice plans for a number of consumer class actions similar to this litigation.

9. Prior to developing classwide notification plans, Mr. Hilsee worked in the advertising industry and his opinions as to the effectiveness of Plaintiffs' proposed Notice Plan are based on survey research techniques used to measure an advertising plan's effectiveness. This court's opinion as to Mr. Hilsee's credibility, and the scientific basis of his opinions is bolstered by the findings of other judges that Mr. Hilsee's testimony is credible. See, e.g. *In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534, 548 (N.D. Ga. 1992). As did Judge Shoob in the *Domestic Air* case, this court, having carefully considered all of the submissions, and reviewed their basis, finds Mr. Hilsee's testimony to be credible. Mr. Hilsee carefully and conservatively testified to the reach of Plaintiffs' proposed Notice Plan, supporting the reach numbers with verifiable data on publication readership, demographics and the effect that overlap of published notice would have on the reach figures.

10. Mr. Hilsee's opinion that Plaintiffs' proposed Notice Plan will have a "net reach" of at least 76.4% of the potential class members through the publication plan, Hilsee Supp. Aff. at ¶ 17, is supportable and verifiable. The "net reach" of Plaintiffs' proposed Notice Plan among State Farm insureds who have had auto parts recently installed is slightly higher at 76.7%. *Id.* This indicates to the court that the plan developed by Plaintiffs is particularly well-targeted at class members. The conservatism of these "reach" numbers is highlighted by the fact that they do not include the effect of Plaintiffs' proposed media and internet activities as the additional reach those activities provide can not be scientifically verified at this time.

11. In support of Plaintiffs' proposed Notice Plan Mr. Hilsee has also noted that because class members may see more than one copy of a published notice (if they read several publications) Plaintiffs' proposed Notice Plan will actually allow each class member an opportunity to view the notice an average of 1.5 times. *Id.* at ¶ 20. The notice provided by the Plaintiffs' proposed Notice Plan is therefore of high quality.

12. In opposition to Plaintiffs' proposed Notice Plan, State Farm presented the court with an affidavit by Richard C. Hoyt, Ph.D., who is the president of a claims administration and economic consulting firm. Dr. Hoyt contends that based upon his firm's experience, the response rate to direct individualized (mailed) notice over published notice is 15 to 20 times greater. Hoyt Aff. at ¶ 5. He further contends that a class member is much more likely to become aware of a notice personally addressed to him than he is to read a notice in a publication. *Id.* Dr. Hoyt's conclusions as to the efficiency of publication notice appear to be based solely upon his firm's experience. The court notes that his opinion does not appear to be based on verifiable data, nor does Dr. Hoyt's experience appear to have been in affording notice of the pendency of a class action and the right to opt out, but rather is in settlement administration. When compared to Mr. Hilsee's carefully considered reach numbers based upon verifiable survey research data, this court concludes that it should discount Dr. Hoyt's opinions as lacking an adequate basis.

13. Dr. Hoyt's challenge to the Plaintiffs' reach statistics is further undercut by evidence presented at the notice hearing based upon United States Postal Service Household Diary Studies that a large portion of mail sent by state and local governments is neither read nor responded to and by additional survey data presented at the hearing. Having carefully considered the various affidavits on the issue, this court finds that the figures as to the reach of Plaintiffs' proposed Notice Plan are conservative and verifiable. Plaintiffs' proposed Notice Plan is carefully tailored to the particular circumstances of this case.

14. As an alternative to Plaintiffs' proposed Notice Plan, State Farm has presented a Notice Plan based upon the contention of State Farm that individual mailed notice is required in this case. Based upon State Farm's position that individual mailed notice is required, State Farm contends that an appropriate mailing list can be generated. State Farm supports its contentions with affidavits filed by John V. Werner, State Farm's Assistant Director of Research in State Farm's Research Department.

15. First, State Farm proposes to generate a list of those State Farm insureds whose vehicle repair estimates specify one or more

non-OEM crash parts included in the class definition. This list would be derived from State Farm's computer estimation system. According to Mr. Werner's affidavit, this estimating system only includes some of the class member's claims. Second Supp. Aff. of John Werner at ¶ 4. Based upon the current class definition and the court's adoption of a crash part definition, State Farm contends that any list generated from the computer estimating system would include approximately 36% of State Farm's policyholders whose vehicle repair estimates listed one or more of the non-OEM crash parts included in the class definition. *Id.* at ¶ 9. By State Farm's own admission, such a list would be under inclusive and would therefore fail to provide mailed notice to a huge number of class members. *Id.* at ¶ 9. Such a list would include, according to State Farm, approximately 1.8 million policyholders who are class members. *Id.* at ¶ 11.

16. State Farm also proposes to generate a list of *virtually all* policyholders who have asserted property damage claims against State Farm since 1987. State Farm admits this list would be over inclusive as only approximately 27% of the persons on this list would be class members. *Id.* at ¶ 10. This over inclusive list would contain the names and addresses of approximately 19.1 million policyholders. *Id.* at ¶ 11. Such a mailing would mislead huge numbers of recipients into thinking they were part of the class when such is not the case, and would be wasteful and unreasonably costly.

17. Neither of the proposed lists for use for individual mailed notice appears to accurately track the members of the class. This problem is highlighted by State Farm's inability to tell the court that it will be able to obtain current addresses for a number of individuals. As noted by Mr. Werner, State Farm's records probably would not contain the current addresses of individuals who moved after dropping State Farm as their insurer. *Id.* at ¶ 15. The court is particularly troubled by possible inaccuracies in the list generated by State Farm based upon evidence presented at the notice hearing that according to U.S. Census Bureau data, approximately 16% of the population moved between March 1996 and March 1997. This rate of address change appears to be

consistent during the entire class period and would rapidly make any list generated by State Farm inaccurate.

18. The court therefore finds that State Farm has not presented, and is not able to present, a reasonably accurate list of potential class members from its records. Any list generated by State Farm would either be inaccurate and over inclusive or inaccurate and under inclusive. Further, State Farm has also failed to present the court with any scientifically verifiable facts which indicate that the reach of their proposed mailing (if it could be done accurately) and limited publication notice plan equals or surpasses the reach of Plaintiffs' proposed Notice Plan. Given the lack of fit between State Farm's two proposed mailing lists and the class members, mailing to this list would not be "practicable" under Illinois law, nor would it be superior to Plaintiffs' proposed Notice Plan. State Farm has entirely failed to convince the court that a reasonably accurate and comprehensive list of class members can be generated in this case.

19. The court is aware that notice in this case must be tailored to the particular circumstances here, which include the following: (1) there are millions of class members dispersed throughout the United States; (2) mailed notice is impracticable, unreasonably expensive, and ineffective; (3) the class members' claims, individually, are of relatively small value; (4) notice can effectively be disseminated through a publication campaign, achieving the same "reach" as mailed notice, but with greater frequency and impact, and at a reasonable cost of approximately $450,000. See e.g., *Miner v. Gillette Co.*, 87 Ill. 2d 7, 15 (1981) (the "circumstances of the individual action" govern the court's exercise of discretion regarding the kind of notice to require); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (to satisfy due process, the "best practicable" notice should be provided; that is, notice which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

20. Based upon a careful examination of the evidence submitted by both parties, the court finds that Plaintiffs' proposed Notice Plan, which includes nationwide publication, at a small fraction of the cost of State Farm's proposed Notice Plan, will have

a superior ability to reach and provide essential information to the class. The court further finds that under the particular circumstances of this case mailed notice is impracticable, and that Plaintiffs' proposed Notice Plan provides the "best practicable" notice which is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

21. State Farm contends that mailed notice to its list is required. This Court has therefore carefully considered the Plaintiffs' and State Farm's proposed Notice Plans in the context of whether mailed notice is required by either Illinois law or due process concerns.

22. As noted in *Miner v. Gillette Co.*, 87 Ill.2d 7, 15 (1981) "[t]he question of what notice must be given to absent class members to satisfy due process necessarily depends upon the circumstances of the individual action." This flexible, pragmatic approach to notice under Illinois law is clearly stated in *Frank v. Teachers Insurance and Annuity Association of America*, 71 Ill.2d 583, 592 (1978) where the court noted that "[we] believe that the trial court's consideration of all of the circumstances of the case before it was appropriate in determining whether the additional protection of notice was required by due process...." Prior Illinois cases have required individual mailed notice when particular circumstances such as the potential for a conflict of interest between the named Plaintiffs and others in the class require it, see *Frank*, 71 Ill. 2d at 596; *Hamer v. Board of Education*, 52 Ill. App. 3d 531, 535 (2nd Dist. 1977), or other unusual circumstances occur. Illinois authorities have also required individual mailed notice, based upon the circumstances of the case, when there is a complete and accurate list of *each* class member and their address. See *Miner*, 87 Ill. 2d at 15 ("[we] believe that in the present circumstances, where the identity and address of each class member is readily accessible by use of the defendant's files, individual notice is required....").

23. The court finds there are no conflicts within this class so as to acquire individual mailed notice. Further, State Farm has not demonstrated to the court that it can generate a list, including *each*

class member, which is accurate so that mailing to such a list is the best notice practicable under Illinois law. Under existing Illinois law, Plaintiffs are not required to provide individual mailed notice to the persons who would be on the inaccurate and incomplete lists which would be generated by State Farm. Such an act would not be the best notice practicable in this case. See *In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (N.D. Ga. 1992).

24. This court also finds that due process does not require individual mailed notice under the circumstances of this case. The flexible notice requirement embodied in the Illinois decisions is consistent with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In that case, Justice Jackson, speaking on the requirements of the Due Process Clause noted that "...at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 313. Nothing in *Mullane* requires individual mailed notice be afforded to an inaccurate and incomplete list of class members, especially given the equally or more effective published notice campaign which can be implemented in this case. See also, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (adopting *Mullane* test as constitutional requirement for due process; notice must be "best practicable").

25. State Farm's reliance upon *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) for the proposition that individual *mailed* notice is required is misplaced. *Eisen* interprets Federal Rule of Civil Procedure 23(c)(2), which specifically directs individual notice in certain circumstances, and which is *less flexible* than 735 ILCS 5/2-803, which provides Illinois state courts with considerably more discretion to determine what kind of notice is required in a particular case. In *Frank v. Teachers Insurance Annuity Association of America*, 71 Ill. 2d 583, 594 (1978) the Illinois Supreme Court "recognized that although 'notice to absent class members as it relates to due process was discussed in *Eisen*, that constitutional requirement was not the basis of the *Eisen* decision.'"; see also, *Cartt v. Superior Court*, 50 Cal. App. 3d

960, 968 (1975) (if Supreme Court intended *Eisen* to refer to other than Rule 23 it could have so held).

26. Relying upon *Miner*, *Frank*, and the United States Supreme Court's decision in *Mullane*, the court finds that Plaintiffs' proposed Notice Plan satisfies due process, is the best notice practicable, and is tailored to fit the unique circumstances of this case.

27. Plaintiffs' proposed form of Class Action Notice has been revised by the court and the Class Action Notice (as revised by the court and attached hereto as Exhibit A), provides to class members all the essential information they need in order to make an informed and meaningful decision regarding whether to remain class members in this case.

28. The Federal Judicial Center's *Manual for Complex Litigation* (3d ed. 1995), § 30.211, identifies the core information which a notice of class action should convey to allow class members to make an informed decision regarding whether they will participate in the class. According to the *Manual*, the notice should: (1) describe succinctly and simply the substance of the action and the positions of the parties; (2) identify the opposing parties, class representatives and counsel; (3) indicate the relief sought; (4) explain any special risks of class members, such as being bound by the judgment, while emphasizing that the court has not ruled on the merits of any claims or defenses; and (5) describe clearly the procedures and deadlines for opting out. The Class Action Notice (Exhibit A) contains all of this essential information, and allows all class members to make an informed and meaningful decision regarding whether to remain class members, and to be bound by any judgment rendered in this action.

29. As noted in the court's December 5, 1997 order, the *Snider* class definition was specifically designed so as to exclude members of the Illinois *Krusinski* class and the *Krinsk* settlement in California. The court therefore finds that the class as defined in this case expressly excludes members of both of these prior class action settlements, and they are therefore not involved in this ongoing litigation before this court. The court further finds that the

Class Action Notice (Exhibit A) gives full notice of the exclusions from the certified class.

30. The court rejects State Farm's proposal to regulate post-notice communications between class members and class counsel. State Farm has failed to provide any evidence which would justify inhibiting communications between class counsel and members of the class who contact class counsel for advice and information.

31. The notice period proposed by Plaintiffs is sufficient. The notice campaign is to commence upon entry of this order, and will run through the opt-out date, which is set herein at June 5, 1998.

32. The Class Action Notice (Exhibit A) and the Plaintiffs' proposed Notice Plan (with revisions made by the court as set forth in paragraph 34 of this Order) comport with the requirements of 735 ILCS 5/2-803, satisfy Constitutional Due Process, are hereby approved by the court and are referred to hereafter as the Class Action Notice (Exhibit A) and Notice Plan (Exhibit B).

33. No evidence was presented that demonstrates the superiority of any alternative to the Notice Plan (Exhibit B), or which in any way casts reasonable doubt on the effectiveness of the Notice Plan (Exhibit B). State Farm has not demonstrated that any alternative to the Notice Plan (Exhibit B) is feasible, practicable, or cost-effective.

34. The revisions to the Notice Plan (Exhibit B) are as follows:

a. The Class Action Notice (Exhibit A) is to be used in all instances instead of the Class Action Notice found in "25. Draft Form of Notices" of the Notice Plan (Exhibit B).

b. The "Press Release" attached hereto as Exhibit C is to be used in all instances instead of the [Draft] Press Release found in "26. Draft Form of Press Release" of the Notice Plan (Exhibit B).

c. The 3 NAPS Releases, each attached and marked as Exhibit D, are to be used in all instances instead of the 3 NAPS Releases found in "28. Draft Form of NAPS

Release" of the Notice Plan (Exhibit B). No cartoons of any type are to be used.

WHEREFORE IT IS ORDERED THAT:

(a) The Class Action Notice (Exhibit A) is hereby approved for publication in the form and text as set forth in Class Action Notice (Exhibit A).

(b) The Notice Plan (Exhibit B) is also approved, as revised pursuant to Paragraph 34 of this Order. Implementation of the Notice Plan (Exhibit B) shall commence after the date of this Order.

(c) The postmark deadline for submission of requests for exclusion from the class shall be June 5, 1998, which shall provide class members with more than 47 days notice of the exclusion deadline. This court recognizes the right of potential class members to exclude themselves from the class conditioned upon compliance with the procedures and deadlines set forth in the Class Action Notice (Exhibit A) and the right of individuals who have filed timely exclusion requests to commence or continue the prosecution of individual actions against State Farm.

ENTERED: February 11, 1998

JOHN SPERONI
ASSOCIATE CIRCUIT JUDGE